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Nos. 73-696 and 73-830

IN THE

Supreme Court of the United States

October Term, 1974

The Emporium Capwell Co., Petitioner

v.

Western Addition Community Organization, et al.

National Labor Relations Board, Petitioner

v.

Western Addition Community Organization, et al.

On writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF THE WAYNE STATE UNIVERSITY CLINICAL LAW PROGRAM IN EMPLOYMENT DISCRIMINATION

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TABLE OF CONTENTS

	Page
Motion to File	1
Brief	2
Statement of Facts	2
Summary of Argument	7
Argument:	
Sections 7 and 9(a) of the National Labor Relations Act Permit the Nondisruptive Efforts of Unionized Employees to Enlist Public Support for a Grievance Against their Employer Alleging Racially Discriminatory Employment Practices	8
Conclusion	31

TABLE OF AUTHORITIES

Cases:	Page
Alexander v. Gardner-Denver Co., — U.S. —, 39 L.Ed. 2d 147, 94 S. Ct. 1011 (1974)	13, 14, 17, 22, 25
Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308	9
Associated General Contractors v. Altshuler, 361 F. Supp. 1293 (D. Mass. 1973), *aff'd,* 490 F.2d 9 (1st Cir. 1973), *cert. denied,*—US—(1974)	9
Bekins Moving & Storage Co. of Florida, Inc., 211 N.L.R.B. No. 7 (1974)	14, 30
Black-Clawson Co. v. International Association of Machinists, 313 F.2d 179 (2nd Cir. 1962)	26

	Page
Bolling v. Sharpe, 347 U.S. 407	30
Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969)	24
Broniman v. Great Atlantic & Pacific Tea Co., 353 F.2d 559 (6th Cir. 1965), *cert. denied,* 384 U.S. 907	26
Civil Rights Cases, 109 U.S. 3	13
Culpepper v. Reynolds Metals Co., 421 F.2d 888 (5th Cir. 1970)	16
Dewey v. Reynolds Metals Co., 291 F. Supp 786 (W.D. Mich. 1968), *rev'd,* 429 F2d 324 (6th Cir. 1970), *aff'd by equally divided Court,* 402 U.S. 689	16
Elgin J. & E. R.R. Co. v. Burley, 325 U.S. 711	23
Ford Motor Co. v. Huffman, 345 U.S. 330	16
Green v. McDonnell Douglas Corp., 463 F.2d 337 (8th Cir. 1972), *vacated,* 411 U.S. 792	11, 14
Griggs v. Duke Power Co., 401 U.S. 424	11, 14
Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966)	24
Harnischfeger Corp. v. NLRB, 207 F.2d 575 (7th Cir. 1953)	19
Hecht v. Co-operative for American Relief, 351 F. Supp. 305 (S.D. N.Y. 1972)	24
Hughes Tool Co., 147 N.L.R.B. 1573 (1964)	14, 30
Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945)	23, 24

	Page
Hughes v. Superior Court of California, 339 U.S. 460	25
Humphrey v. Moore, 375 U.S. 335	16
Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969)	24
Jones v. Alfred H. Mayer Co., 392 U.S. 409	13
Jones v. Leeway Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), *cert. denied,* 401 U.S. 954	9
H. Kessler & Co. v. EEOC, 472 F.2d 1147 (5th Cir. 1973) *(en banc), cert. denied,* 412 U.S. 939	15
Linn v. United Plant Guard Workers, 383 U.S. 53	9
Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919	14
Marlowe v. General Motors Corp., 489 F.2d 1057 (6th Cir. 1973)	14
Medo Photo Supply Corp. v. NLRB, 321 U.S. 678	20
Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972)	25
Moss American, Inc., 178 N.L.R.B. 189 (1969)	19
NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175	18
NLRB v. Associated Machines, Inc., 219 F.2d 433 (6th Cir. 1955)	23
NLRB v. Babcock & Wilcox Co., 351 U.S. 105	22
NLRB v. Brown, 380 U.S. 278	22
NLRB v. Cabot Carbon Co., 360 U.S. 203	22

	Page
NLRB v. Draper Corp., 145 F.2d 199 (4th Cir. 1944)	19
NLRB v. Fruit and Vegetable Packers, 377 U.S. 58	25
NLRB v. Magnavox Co. of Tennessee, — U.S. —, 39 L. Ed. 2d 358, 94 S. Ct. 1099	12
NLRB v. Mansion House Center Management Co., 473 F.2d 471 (8th Cir. 1973)	14, 30
NLRB v. Shop Rite Foods Inc., 430 F.2d 786 (5th Cir. 1970)	19, 25
NLRB v. Sunbeam Lighting Co., 318 F.2d 661 (7th Cir. 1963)	19
NLRB v. Tanner Motor Livery Ltd., 349 F.2d 1 (9th Cir. 1965)	10
NLRB v. Tanner Motor Livery Ltd., 419 F.2d 216 (9th Cir. 1969)	24, 25
NLRB v. Washington Aluminum Co., 370 U.S. 9	10, 29
Newman v. Piggie Park Enterprises, 390 U.S. 400	13
New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552	9
Norman v. Missouri Pacific R.R. Co., 414 F.2d 73 (8th Cir. 1969)	14
Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968)	24
Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969)	11
Pioneer Bus Co., 140 N.L.R.B. 54 (1962)	14, 30

	Page
Shelly v. Kraemer, 334 U.S. 1	30
Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192	14, 16
Talley v. California, 362 U.S. 60	9
United Packinghouse Workers v. NLRB, 416 F.2d 1126 (D.C. Cir. 1969), *cert. denied sub nom.*, Farmers Co-operative Compress v. United Packinghouse Workers, 396 U.S. 903	14
United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied,* 389 U.S. 837	14
United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971)	14
United States v. Chesapeake & Ohio Ry. Co., 471 F.2d 582 (4th Cir. 1972)	9
United States v. Hayes International Corp., 456 F.2d 112 (5th Cir. 1972)	9
United States v. Ironworkers, Local 86, 443 F.2d 544 (9th Cir. 1971), *cert. denied,* 404 U.S. 984	9
United States v. St. Louis-San Francisco Ry., 464 F.2d 301 (8th Cir. 1972), *cert. denied,* 411 U.S. 1116	9
Vaca v. Sipes, 386 U.S. 171	16
Washington State Service Employees State Council No. 18, 188 N.L.R.B. 957 (1971)	10
Western Cartridge Co. v. NLRB, 139 F.2d 855 (7th Cir. 1943)	19

Statutes: Page

Civil Rights Act of 1964, Title VII, *as amended,* 78 Stat. 253, 42 U.S.C. §2000e *et seq:*

Section 701(f), 42 U.S.C. §2000e(f) 12

Section 704(a), 42 U.S.C. §2000e-3(a)....7, 10, 11, 12, 25, 26

Section 705(g), 42 U.S.C. §2000e-4(g).... 27

National Labor Relations Act, *as amended,* 29 U.S.C. §157 *et seq.*

Section 7, 29 U.S.C. §157.....8, 9, 10, 11, 17, 21, 23, 26, 27, 29, 30

Section 8(a)(1), 29 U.S.C. §158(a)(1).... 18, 31

Section 8(a)(4), 29 U.S.C. §158(a)(4).... 10

Section 8(b)(7), 29 U.S.C. §158(b)(7)....17, 19

Section 8(d), 29 U.S.C. §158(d)..... 21

Section 9(a), 29 U.S.C. §159(a)..7, 8, 12, 17, 19, 20, 22, 23, 26, 27

Miscellaneous: Page

EEOC Decision No. 71-1804, 1973 CCH EEOC Decisions ¶6264 (April 19, 1971)..... 11

Gould, *Black Power in the Unions: The Impact on Collective Bargaining Relationships,* 79 YALE L. J. 46 (1969) 17, 29

Note, *Title VII and N.L.R.A.: Protection of Extra-Union Opposition to Employment Discrimination,* 72 MICH. L. REV. 313 (1973) 15

Senate Committee on Labor and Public Welfare, *Report No. 92-415,* 92d Cong., 1st Sess. (1971) 24

U. S. Commission on Civil Rights, *Statement on Affirmative Action for Equal Employment Opportunities* (1973) 15

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MOTION TO FILE OUT OF TIME AND BRIEF AMICUS CURIAE OF THE WAYNE STATE UNIVERSITY CLINICAL LAW PROGRAM IN EMPLOYMENT DISCRIMINATION

MOTION TO FILE OUT OF TIME

The Wayne State University Clinical Law Program hereby moves to file its brief *amicus curiae instanter*. The Program had previously received the concurrence of all parties to file its brief *amicus curiae* in accordance with Court Rule 42. (Copies of the authorizations have been filed with the Clerk). Its brief was originally due August 13, 1974, the date Respondent's brief was due. Attorneys for all parties have been contacted and none objects to the granting of this motion.

The Wayne State University Clinical Law Program in Employment Discrimination is a publicly funded part of the Wayne State University Law School and is charged with the duty of assisting the private bar and aggrieved persons to eliminate employment discrimination through all lawful means. Its experience has shown that no avenue of lawful redress should be limited, except under the most compelling circumstances, if the constitutional and congressional promises of non-discrimination in employment are to be successfully met. The Board decision herein needlessly narrows employee rights to oppose unlawful racial discrimination and thus hampers all efforts to end such discrimination.

BRIEF OF AMICUS CURIAE

STATEMENT OF THE FACTS

Almost six years ago, in November, 1968, Hollins, a temporary supervisor, and Hawkins, a stock clerk, were discharged by the Emporium-Capwell Company for peacefully distributing leaflets to the public during store hours, on the public sidewalk adjoining the store, on their own time.[1] The leaflets urged a public boycott of the store as a protest[2]

[1] App. pp. 21-31 (testimony of Hawkins on direct examination). "App." refers to the appendix to the briefs in the court below. A copy has been filed with the clerk.

The discharge letter read: "You are being discharged today. Distribution of 'Boycott Emporium' literature on Saturday, November 9th, 1968 in front of the Emporium, 835 Market Street, S. F. pursuant to written warning dated November 2, 1968." App. 31.

[2] App. 196, 198.

against its allegedly discriminatory employment practices.[3] Before discharging them, the company issued a written warning that they would be discharged should they repeat

[3] Statistics introduced at the Board hearing showed the following distribution of employees at the Emporium-Capwell Company stores in 1968:

	ALL EMPLOYEES			MINORITY GROUP EMPLOYEES							
				Male				Female			
Job Categories	Total (Col. 2+3)	Male	Female	Negro	Oriental [2]	American Indian [2]	Spanish Surnamed American [2]	Negro	Oriental [2]	American Indian [2]	Spanish Surnamed American
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Official and managers	1145	538	607	10	9		18	10	11		9
Professionals	66	27	39		1		3				
Technicians	20	20			1						
Sales Workers	2898	332	2566	11	7		14	102	47		105
Office and clerical	827	30	797	6	3			36	59		57
Craftsman (Skilled)	76	75	1	1			1				
Operatives (Semi-Skilled)	143	64	79	1	3		5	6	5		5
Laborer (Un-Skilled)	372	201	171	24	7		25	16	9	1	22
Service Workers	632	227	405	23	10		51	37	23	-	37
Total	6179	1514	4665	76	41		117	207	154	1	235

App. 230

the incident,[4] and waited until they actually did repeat the same activity before discharging them.

The protest is traceable to a written survey which the two employees helped to organize and conduct.[5] In addition to the survey, a seven-item questionnaire[6] which was distributed to minority employees, they compiled case studies on several employees who had alleged employer discrimination.[7] They concluded that there was a general feeling among all the "black, brown, yellow, and red" employees that their employer was treating them in a discriminatory manner,[8] and submitted grievances to the union. They informed the union before it presented their grievance to the adjustment board that theirs was a class grievance regarding the company's treatment of employees of all

[4] App. 199. The warning also cautioned them not to hold press conferences to discuss the alleged racial discrimination.

[5] App. 36-38, 91-92 (testimony of Hawkins and Hollins, respectively).

[6] "(1) How long have you worked at the Emporium?

"(2) Have you ever been offered a promotion? (Taking supervisor test, Training program, etc.)

"(3) How many times have you been to Personnel? (For complaints, working conditions or insubordination.)

"(4) Who is your supervisor? How many have you had since you've been working?

"(5) What is your present rate of pay? Have you ever gotten a merit raise?

"(6) Is your department a fast or slow moving dept., as far as raises or promotions?

"(7) Are you presently pleased with your job? (Or would you like to be trained or promoted?)"

App. 174.

[7] App. 168-87.

[8] App. 38-39, 91-92 (testimony of Hawkins and Hollins, respectively).

minority races and national origins, and not a set of individual complaints.[9] The union, however, refused to process the grievance as the employees had requested. Instead, the union offered to remedy the situation by conducting an independent hearing before a joint industry-union adjustment board on behalf of each potential grievant.[10] Union secretary-treasurer Johnson may have intended to do well by the protestors, but his attitude was essentially unresponsive. His offer on behalf of the union to dispose of the grievance on a case-by-case basis was rejected by the employees as an unacceptable prolongation of discriminatory terms of employment for most of the affected employees.[11] They therefore refused to testify as individual complainants before the adjustment board.[12] They did not take any independent action until they had received explicit assurance from union secretary Johnson that "individuals could take whatever action they wanted to as long as it is legal."[13] Thereafter Hollins attempted to discuss with the company president "things that were happening among minority employees at the store,"[14] but the president referred him to the personnel director, to whom Hollins had already spoken.[15] Shortly thereafter Hawkins and Hollins called a press conference, at which they accused the com-

[9] App. 47-48, 125-26 (testimony of Hawkins and Hollins, respectively, on cross examination). App. 137-38 (testimony of Johnson, Secretary-Treasurer, Local 1100, Department Store Employees Union).

[10] See App. 136 (testimony of Johnson).

[11] App. 49 (testimony of Hawkins).

[12] App. 49, 114 (testimony of Hawkins and Hollins, respectively).

[13] App. 146 (testimony of Johnson).

[14] App. 121 (testimony of Hollins).

[15] App. 122 (testimony of Hollins).

pany of racially discriminatory practices, revealed their intention to urge a boycott, and read the handbill they into the adjustment board that theirs was a class grievance tended to distribute.[16] The company issued a warning letter to Hollins which contained a reference to this press conference as well as to the handbilling,[17] but the discharge letters[18] and Hawkins' warning[19] referred only to the handbilling. Referred by their employer to a management official whom they apparently felt was unsympathetic to their concerns, and bound by their union to a grievance procedure which they felt was not responsive to the problem, the employees believed that they were left with only one simple and expeditious solution: public protest. They conducted their protest by distributing leaflets on the public sidewalk, without blocking store entrances, without harassing or intimidating customers, without violence, and on their own time. They followed the union's advice that individual action was permissible; nowhere did their literature indicate their status either as union members or as employees.[20]

At no point did the union disapprove or disavow the protesters' activities. To the contrary, the union indicated only that it felt that it had a contractual obligation not to picket or boycott the employer.[21] When union secretary

[16] App. 17-18, 20-21, 81-83 (testimony of Hawkins and Hollins, respectively).

[17] 485 F.2d 923 n.17.

[18] See note 1, *supra*.

[19] App. 197.

[20] The first leaflets were distributed in the name of the Western Addition Community Organization, App. 196, while the second batch of leaflets was unsigned. App. 198.

[21] App. 146 (testimony of Johnson).

Johnson was asked, "Did you advise the employees that they should follow the union procedure set forth in the contract?" he replied, "I said that if they wanted some longlasting effect that they should follow the union's procedure and I wasn't going to engage in any drama, however, if they wanted to take any other action they could do it as individuals and do whatever they wanted as individuals."[22] After Hollins and Hawkins were discharged, the union promptly filed a grievance on their behalf.[23] In fact, the union has filed a brief *amicus curiae* with this Court in support of the protesters.

SUMMARY OF ARGUMENT

The elimination of racial discrimination in employment is an integral part of this nation's over-all labor policy and has been considered by the Board and the courts as a matter of "highest priority."

The two discharged employees here were attempting to present a group grievance challenging employment practices which they justifiably and in good faith believed violated federal statutes and their collective bargaining agreement. Such a group grievance is explicitly permitted by the proviso to §9(a) of the National Labor Relations Act, even when an exclusive bargaining agent exists. Congress has recognized in §704 of the 1964 Civil Rights Act that

[22] App. 149 (testimony of Johnson). Had the union itself engaged in handbilling, it technically would not have been violating the collective bargaining agreement since the agreement contained no antipicketing clause. Both the union and the Board, however, believed that union picketing would have violated the spirit of the collective bargaining agreement.

[23] App. 138 (testimony of Johnson).

enlisting public support for such grievances through peaceful picketing should ordinarily be protected; no provision of the National Labor Relations Act withdraws that protection when a grievance is involved.

The employer was not obligated to deal with the employees engaged in the peaceful protest, but it had several realistic alternatives had it chosen to do so.

ARGUMENT

SECTIONS 7 AND 9(a) OF THE NATIONAL LABOR RELATIONS ACT PERMIT THE NONDISRUPTIVE EFFORTS OF UNIONIZED EMPLOYEES TO ENLIST PUBLIC SUPPORT FOR A GRIEVANCE AGAINST THEIR EMPLOYER ALLEGING RACIALLY DISCRIMINATORY EMPLOYMENT PRACTICES.

Hawkins and Hollins were discharged solely for "distribution of 'Boycott Emporium' literature"[24] in front of their employer's store, peacefully, on the public sidewalk, on their own time, without blocking entrances, harassing customers, or disparaging their employer's goods. The handbills which they distributed attacked the Emporium's alleged unlawful racially discriminatory employment practices (specifically its promotion policies) and urged "our people to take their money out of this racist store." The handbills did not advise or encourage fellow employees to take any action, and no work stoppage occurred.

The parties agree that Hawkins and Hollins were acting in good faith. The evidence introduced at the Board hear-

[24] The discharge slips give the handbilling as the only basis for either discharge. The warning notices also threatened discharge for issuing public statements at press conferences or for "mak[ing] any similar public statement." App. 189, 197.

ing (n. 3, *supra)* demonstrated that their beliefs were well founded; indeed, the evidence presents a *prima facie* case of employment discrimination.[25] No one contends that Hawkins' and Hollins' protest activities interfered with their work. And the record demonstrates that they did not distribute boycott handbills until nearly seven months after they first began to work through their union and the contractual grievance machinery to challenge the Emporium's treatment of blacks.

It seems clear that had Hawkins and Hollins not been Emporium employees, but strangers peacefully distributing the very same leaflets in the same manner and in the same public place, they would have been wholly free to continue their activities. *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552; *cf. Talley* v. *California*, 362 U.S. 60. See also *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 313. Hawkins and Hollins would thus have been subject to no sanctions other than potential liability for libel. *Linn* v. *United Plant Guard Workers*, 383 U.S. 53.

It also seems evident that if Emporium employees had *not* been represented by a union, Hawkins and Hollins would have been protected against discharge for their

[25] *Associated General Contractors* v. *Altshuler*, 361 F.Supp. 1293, 1299(D. Mass 1973), *affd*, 490 F.2d 9, 18 n.15 (1st Cir. 1973), *cert. denied*, — U.S. — (1974); *United States* v. *Chesapeake & Ohio Ry. Co.*, 471 F.2d 582, 586 (4th Cir. 1972); *United States* v. *St. Louis-San Francisco Ry.*, 464 F.2d 301, 307 (8th Cir. 1972), *cert. denied*, 411 U.S. 1116; *United States* v. *Hayes International Corp.*, 456 F.2d 112 (5th Cir. 1972); *United States* v. *Ironworkers, Local 86*, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984; *Jones* v. *Lee Way Motor Freight Inc.*, 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954.

activities by §7[26] of the National Labor Relations Act. *National Labor Relations Board* v. *Washington Aluminum Co.*, 370 U.S. 9; *National Labor Relations Board* v. *Tanner Motor Livery, Ltd.*, 349 F. 2d 1, 4 (9th Cir. 1965); *Washington State Service Employees State Council No. 18*, 188 N.L.R.B. 957, 958-959 (1971). In addition, they would have been protected by §704(a) of Title VII, Civil Rights Act of 1964.[27] Unlike a parallel section of the National Labor Relations Act,[28] which merely protects individuals from retaliatory discipline for using or assisting the administrative mechanisms of that Act, §704(a) also protects employees who have "opposed any practice made an unlawful employment practice" by Title VII. *Pettway* v. *American*

[26] Section 7 provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

29 U.S.C. § 157 (1970).

[27] Section 704(a) reads in relevant part:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees *because he has opposed any practice made an unlawful employment practice by this title*, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title." (Emphasis supplied.)

42 U.S.C. §2000e-3(a) (1970).

[28] Section 8(a)(4) provides:

> "(a) It shall be an unfair labor practice for an employer . . .
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter."

29 U.S.C. §158(a)(4).

Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969).[29] While judicial interpretation of §704(a) has been sparse, the Equal Employment Opportunity Commission[30] has held that an "employee has a statutory right under [§704(a)] to oppose, without retaliation, any unlawful employment practices of his employer," and that such opposition may be manifested by peaceful employee picketing. EEOC Dec. No. 71-1804, 1973 CCH EEOC Decisions ¶6264, at 4468 (April 19, 1971). *Cf. Green* v. *McDonnell Douglas Corp.*, 463 F.2d 337, 341 (8th Cir. 1972), *vacated on other grounds*, 411 U.S. 792 (1973). The wording of §704(a) is unambiguous; there is not the slightest hint that its broad protection does not extend to effective methods of opposing an employer's unlawful discriminatory practices including publicity and peaceful attempts to attract consumer support.

Moreover, had Hollins and Hawkins been supervisors, and thus not protected by §7 of the National Labor Relations Act, they nevertheless would have been protected by §704(a) against discharge for their press conference and leafletting. These were activities opposing the Emporium's allegedly discriminatory practices within the meaning of §704(a); that section's protection is not limited

[29] The *Pettway* court wrote:

> "The protective provisions of Title VII are substantially broader than even those included in the Fair Labor Standards Act and the National Labor Relations Act in that, in addition to protecting charges and testimony, Title VII also specifically protects assistance and participation. This indicates the exceptionally broad protection intended for protestors of discriminatory employment practices." 411 F.2d at 1006, n. 18.

[30] The EEOC has primary administrative responsibilities under Title VII. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34.

to nonsupervisory employees, but extends to all employees.[31] *See* §701(f), 42 U.S.C. 2000e-(f) (1970).

Thus, while strangers, supervisory personnel, and nonunionized employees engaged in good faith peaceful public protest against the Emporium's racially discriminatory employment practices are statutorily protected against the Emporium's retaliation, the Board majority condones the discharge of Hawkins and Hollins solely because they belong to a group of employees represented by a collective bargaining agent. We contend that nothing in the National Labor Relations Act or in its underlying premises warrants so harsh and anomalous a result. This is not to say that the Board is now obligated to enforce provisions of Title VII. Rather, as this Court has recently observed, "[i]t is the Board's function to strike a balance among conflicting legitimate interests which will 'effectuate national labor policy'. . .". *NLRB* v. *Magnavox Co.*, — U.S. —, 39 L. Ed. 2d 358, 362, 94 S. Ct. 1099. In the present case, the Board can effectuate the national labor policy expressed in §§7 and 704(a) without damaging the national labor policy of exclusivity reflected in §9(a).[32] We will show below that

[31] Had Hawkins and Hollins been engaged in the identical protest against their union they would also have been protected by §704 (a); §704(a) protects union members from retaliation by labor organizations for opposing unlawful employment practices.

[32] Section 9(a), 29 U.S.C. §159(a), provides:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and

(*continued on next page*)

even if peaceful employee handbilling directed at an employer's discriminatory employment practice creates tensions, the two policies are reconcilable. This case, especially, does not require the subordination of one to the other because in this case there is no conflict between the right to protest and the principle of exclusivity. Nor does granting unionized employees the same protest rights as strangers, supervisory personnel, and nonunionized employees endanger orderly collective bargaining.

This Court has often emphasized that the elimination of racial discrimination vindicates "a policy that Congress considered of the highest priority." *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402. And in *Alexander* v. *Gardner-Denver Co.*,—U.S.—, 39 L. Ed 2d 147, 160, 94 S. Ct. 1011, this Court has said, "Title VII strictures are absolute and represent a congressional command that each employee be free from discriminatory practices." Elsewhere, this Court has observed that the Constitution embodies a national promise that blacks will be free from racial discrimination in such fundamental rights as the right to contract, which necessarily includes the right to contract one's labor. *Civil Rights Cases*, 109 U.S. 3, 32; *id.* 35 (Harlan, J., dissenting); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 443.

In the light of these constitutional and congressional priorities, this Court and lower courts, as well as the Board, have repeatedly held that the elimination of dis-

(*continued from preceding page*)

> to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment."

criminatory employment practices is a fundamental goal of national labor policy which takes precedence over general principles of labor law. *Alexander* v. *Gardner-Denver Corp., supra; Griggs* v. *Duke Power Co.,* 401 U.S. 424, 429; *Steele* v. *Louisville & Nashville R.R. Co.,* 323 U.S. 192, 208-209 (Murphy, J. concurring); *National Labor Relations Board* v. *Mansion House Center Management Co.,* 473 F.2d 471 (8th Cir. 1973); *United Packinghouse Workers* v. *NLRB,* 416 F.2d 1126 (D.C. Cir. 1969), *cert. denied sub nom., Farmers' Cooperative Compress* v. *United Packinghouse Workers,* 396 U.S. 903; *United Rubber Workers* v. *NLRB,* 368 F.2d 12 (5th Cir. 1966), *cert. denied,* 389 U.S. 837; *Bekins Moving & Storage Co. of Florida, Inc.,* 211 N.L.R.B. No. 7 (1974); *Hughes Tool Co.,* 147 N.L.R.B 1573, 1574-75 (1964); *Pioneer Bits Co.,* 140 N.L.R.B. 54 (1962). See also *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 800. *Cf.* appellate court decisions interpreting Title VII as modifying collective bargaining principles; *e.g., Norman* v. *Missouri Pacific R.R. Co.,* 414 F.2d 73 (8th Cir. 1969); *Local 189, United Papermakers and Paperworkers* v. *United States,* 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919; *United States* v. *Bethlehem Steel Corp.,* 446 F.2d 652 (2d Cir. 1971); *Marlowe* v. *General Motors Corp.,* 489 F.2d 1057 (6th Cir. 1973).

Indeed, Congress is now so deeply committed to the elimination of racial discrimination that on several occasions during the past decade it has refused to limit individuals to any one forum or statute for the redress of discriminatory employment practices. See *Alexander* v. *Gardner-Denver Co., supra,* slip opinion at 11 n. 9. Nonetheless, even the available statutory and administrative mechanisms have been insufficient:

> "The mechanisms created by Title VII alone cannot handle the dimensions of the problem. In FY 1972 the EEOC received 38,840 complaints; it expects 45,000 new complaints during the next fiscal year. The growing backlog of cases is now 53,410, of which 43,101 are pending investigation. Conciliation, enforcement and litigation against employment discrimination cannot receive EEOC priority in such a situation." U.S. Comm'n on Civil Rights, *Statement on Affirmative Action for Equal Employment Opportunities* 3-4 (1973).

Enforcement of Title VII through the courts is now estimated to require total elapsed time of more than three years.[33] Note, *Title VII and N.L.R.A.: Protection of Extra-Union Opposition to Employment Discrimination,* 72 MICH. L. REV. 313, 320 n. 47 (1973). This delay has lead one commentator to observe:

> "Delay in obtaining reinstatement, back pay, or other affirmative relief in a case involving discharge or discriminatory hiring and promotion practices may seriously impair the value of the federal remedy." *Id.* 320.

In addition to significant delays, Title VII's mechanisms are inadequate for another reason: the employee may be unaware of it. A union member's first instinct is to turn to his union for relief, just as Hollins and Hawkins did in this case.[34]

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[33] The great difficulty experienced by employees in obtaining counsel for Title VII litigation has been deplored by several courts. See *H. Kessler & Co.* v. *EEOC,* 472 F.2d 1147 (5th Cir. 1973) (*en banc*), *cert. denied,* 412 U.S. 939, and cases cited therein.

[34] Courts have recognized that employees are most likely to depend on procedures with which they are most familiar. "It is under-

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Traditional labor remedies have also been unsuccessful. Certainly the employer cannot be relied on to bring his own unlawful behavior before the Board, and the union may discharge its obligations by refusing to process even a meritorious grievance.[35] As one scholar has concluded, "[s]uits to enforce the union's duty of fair representation, which can be brought before the N.L.R.B. and the courts,

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standable that any union member would first proceed to raise any rights he felt were due him under the contract" before seeking judicial or administrative relief. *Dewey* v. *Reynolds Metal Co.*, 291 F. Supp. 786, §789 (W.D. Mich. 1968), *rev'd on other grounds*, 429 F.2d 324 (6th Cir. 1970), *aff'd by equally divided Court*, 402 U.S. 689. *Cf. Culpepper* v. *Reynolds Metal Co.*, 421 F.2d 888, 891-892 (5th Cir. 1970). This would have been especially true in 1968, when Title VII was relatively untried and unknown.

[35] One of the principal obstacles to the eradication of discrimination in employment has been the extremely narrow scope of the duty of fair representation as it is presently defined. Plaintiffs must prove hostile discrimination to establish a violation. *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192; *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337; *Humphrey* v. *Moore*, 375 U.S. 335, 342, 348-51. Even more to the point here, "*a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious.*" *Vaca* v. *Sipes*, 386 U.S. 171, 194 (emphasis supplied). Thus a union concerned about tactical considerations may discharge its obligations to its minority members by perfunctory compliance with its statutory duty. If, as petitioners insist, compliance with the duty of fair representation as currently defined were allowed to act as a bar against employee protests, unions would be able "to control the scope, direction, pace, and degree of elimination of racial discrimination." 192 N.L.R.B. at 176 (Jenkins, dissenting). In this case, the Board refused to protect employee public protests against unlawful discrimination in part because the union took *some* action in their behalf, and therefore did not breach its statutory duty. Given the discrepancy between the union's limited statutory duty and the employer's obligation to end all traces of demonstrated racial discrimination, such a result is intolerable. Hence, at least until there is a redefinition of the union's duty of fair representation, courts and administrative agencies must vigilantly protect the rights of employees to bring such unlawful employment practices before the public, except under the most compelling circumstances.

and the various remedies created by the N.L.R.B. in response, have proven similarly ineffective." Gould, *Black Power in the Unions*, 79 YALE L. J. 46, 50 (1969) (footnote omitted; emphasis supplied). Nor has arbitration provided adequate relief. This Court based a recent decision in large part on its perception that arbitration under a collective bargaining agreement often subordinates the interests of the individual to the collective interests of the majority, "especially where a claim of racial discrimination is made." *Alexander* v. *Gardner-Denver Co.*, *supra*, slip opinion at 21 n.19.

In short, it has been extremely difficult for the victims of employment discrimination to obtain prompt relief through the established channels. Under such circumstances, it should be entirely proper under §7 to permit aggrieved employees to enlist public support through peaceful handbilling in support of their good faith grievances against their employer's discriminatory practices. This protection is compelled particularly because it supports, through constructive action, a principal goal of national labor policy—the eradication of racially discriminatory employment practices.

The Board majority in this case asserts, in effect, that attempts to eliminate discrimination must be subordinated to the requirement that there be but one exclusive bargaining agent for any given group of employees. The Board cites §9(a) and 8(b)(7)[36] of the National Labor Relations

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[36] Section 8(b)(7), 29 U.S.C. §158(b)(7), provides:

> . . . "It shall be an unfair labor practice for a labor organization to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or

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Act as its statutory support and relies on *dictum* in *National Labor Relations Board* v. *Allis-Chalmers Mfg.*, 388 U.S. 175, 180, a §8(a)(1) case, for a statement of the philosophy underlying these provisions. National labor policy, the Court stated in *Allis-Chalmers*,

> "has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions."

In addition, exclusivity is said to promote orderly collective bargaining (1) by preventing the employer from negotiating with union dissidents and thereby exploiting differences in the bargaining unit, and (2) by preventing an employer from being caught between the conflicting demands of groups of employees. We contend that the circumstances of this case neither require the invocation of exclusivity nor serve its underlying purposes.

Peaceful public protest against racial discrimination, conducted on the employees' own time, without disrupting the employment relationship between the Emporium and any of its employees, is not a type of activity which vio-

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> forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
>
> "(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title . . . ."

lates §9(a).[37] The typical §9(a) violation involves a wildcat strike called during negotiations between the employer and the union for a new collective bargaining agreement by employees who are unhappy with the progress of negotiations. Virtually every decision cited by the Board involved either such a strike or an attempt by the employer to circumvent the collective bargaining agent. See, *e.g.*, *National Labor Relations Board* v. *Shop Rite Foods, Inc.*, 430 F.2d 786 (5th Cir., 1970) (wildcat strike to protest unsubstantiated discharge of employee for pilferage); *National Labor Relations Board* v. *Sunbeam Lighting Co*, 318 F.2d 661 (7th Cir. 1963) (wildcat called after employees learned terms of employer's final offer informally, before union could present it for a vote); *Harnischfeger Corp.* v. *NLRB*, 207 F.2d 575 (7th Cir. 1953) (wildcat called to put pressure on the union bargaining committee during negotiations); *National Labor Relations Board* v. *Draper Corp.*, 145 F.2d 199 (4th Cir. 1944) (wildcat called during contract negotiations, in which strikers demanded retroactive wage increase as condition of returning to work); *Western Cartridge Co.* v. *NLRB*, 139 F.2d 855 (7th Cir. 1944) (wildcat strike called by employee group which had been negotiating independently of the union regarding

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[37] Nor does it violate §8(b)(7), since theirs was not recognitional picketing. See *Moss American, Inc.*, 178 N.L.R.B. 189 (1969). The question of whether the protesting employee here constituted a "labor organization" was not litigated. However, it is likely that Hollins and Hawkins did not consider themselves representatives of an organization. They *did* consider themselves representatives of a *class* of minority employees, and wanted to present a grievance as representatives of that class. Section 9(a) explictly provides that a "group of employees" may present grievances. There is nothing to indicate that Hawkins and Hollins picketed for any other purpose. We agree with respondents and the lower court, however, that if Hawkins' and Hollins' activities are considered "bargaining," both §9(a) and §8(b)(7) must be construed in the light of the compelling national interest in protecting protests against race discrimination.

grievances). See also *Medo Photo Supply Corp* v. *NLRB*, 321 U.S. 678 (employer bargaining without presence of bargaining agent). The rule which can be drawn from the cases on which the Board relies, then, is that these unauthorized *strikes* are not protected by §7, because they interfere with the bargaining responsibilities of the exclusive representative and because a strike—unlike peaceful handbilling directed at consumers—is inherently disruptive of the relationship between employer and employees.

The distinction between the type of activity in derogation of the collective bargaining agent normally associated with §9(a) violations and the peaceful handbilling of consumers in this case is apparent. Hollins and Hawkins justifiably believed the employer was failing to live up to Title VII and to the contractual provision forbidding discriminatory employment practices,[38] and were demanding an immediate end to the asserted breach of contract and law. They were not attempting to fashion future terms and conditions of employment, but to require the Emporium to honor its existing contractual and legal obligations not to discriminate.[39] Indeed, had the union here pursued the

[38] Section 21(e) of the union contract forbids discrimination by the employer:

> "No person shall be discriminated against in regard to hire, tenure of employment, or job status by reason of race, color, creed, national origin, age or sex." App. 205.

[39] "There is not a scintilla of proof that the picketing employees wanted discussions leading to agreements on new conditions of employment, or even a modification of existing ones, or even to effect a compromise of the grievances. In short, the employees did not picket Respondent for the purpose of negotiating an agreement but simply to urge Respondent to take action to correct conditions of racial discrimination which the employees reasonably believed existed at the Emporium."

192 N.L.R.B. at 178-79 (Brown, dissenting.)

identical claims—whether on an individual basis, as it insisted or on behalf of all minority employees, as Hawkins and Hollins wished—it would have been engaged in grievance resolution, not bargaining.

The Board's redefinition of bargaining in the present case to include handbilling which had the object of putting public pressure on the employer to honor its contractual and legal obligations to end discriminatory employment practices is an unwarranted extension of the meaning of "bargaining." "Bargaining" has heretofore been defined under the National Labor Relations Act as "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." NLRA §8(d).[40] This statutory definition cannot be interpreted to include attempts by employees to enlist public pressure in support of their grievances against the employer's racially discriminatory employment practices. Employers cannot make nondiscriminatory personnel policies a term or condition of employment any more than they can make their other legal obligations conditions of employment:

[40] Section 8(d), 29 U.S.C. §158(d), provides in pertinent part:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ."

> "Of necessity the rights conferred by Title VII can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII." *Alexander* v. *Gardner-Denver Co., supra,* slip opinion at 14-15.

Hollins' and Hawkins' attempts to exert economic pressure on their employer to end the Emporium's unlawful practices therefore cannot be deemed an attempt to bargain.[41]

Hawkins' and Hollins' activities, rather, were an integral part of an attempt to settle a grievance against discriminatory practices which they justifiably believed violated their contract and the law. *See* first proviso to §9(a), note 31, *supra.*[42] They attempted to have their union and em-

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[41] The board and the appellate court accepted the trial examiner's characterization of the issue in this case as involving the alleged right of individual employees to "bargain" with their employer regarding the terms and conditions of employment in derogation of the designated bargaining representative. We submit that the trial examiner erred. He failed to recognize that §9(a) explicitly provides that "a *group* of employees shall have the right at any time to present grievances." See *National Labor Relations Board* v. *Cabot Carbon Co.*, 360 U.S. 203. The trial examiner's conclusion not only forces an unnecessary confrontation between §7 and §9(a), but should be struck down as unsupported by substantial evidence. See *National Labor Relations Board* v. *Babcock and Wilcox Co.*, 351 U.S. 105, 112-113; *National Labor Relations Board* v. *Brown*, 380 U.S. 278, 290-292.

[42] The proviso to §9(a), distinguishes grievances from bargaining:

> "[C]ollective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment which will fix for the future the rules of the employment for everyone in the unit, is distinguished from 'grievances', which are usually the claims of individuals or small groups that their rights under the collective bargain have not been respected. These claims may involve no question of the meaning and scope of the bargain, but

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ployer resolve their grievance, which alleged race discrimination against a class consisting of all the Emporium's minority employees, particularly blacks.[43]

After about six months they became convinced that resolving the grievances in the manner insisted upon by the union would not provide adequate relief to the class for which they were grieving. Their belief was amply justified: it is now well recognized that systemic discrimination cannot be successfully rooted out by isolated and insular attacks on individual complaints. As one court stated in a slightly different context:

> "[T]he underlying discriminatory attitude not only can, but appropriately should be decided as a

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> only some question of fact or conduct peculiar to the employees not affecting the unit." *Hughes Tool Co.* v. *NLRB*, 147 F.2d 69, 72-73 (5th Cir. 1945) (footnote omitted).

Accord, *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U.S. 711, 722; *NLRB* v. *Associated Machines, Inc.*, 219 F.2d 433 (6th Cir. 1955). As to grievances, §9(a) does not give the bargaining representative

> "the *exclusive* right to handle them unless they really involve a bargaining for the unit, or an interpretation of the bargain. On the contrary it expressly gives such employee or group of employees the right to present their own grievances to the employer. The purpose is to preserve in each employee as a right this direct approach to the employer to secure full consideration of his case.[2]
>
> "[2] That Congress intended to preserve the right of employees to confer with the employer is further evidenced by the proviso in Section 8(2): 'Subject to rules and regulations made and published by the Board pursuant to Section 6 an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.'" *Hughes Tool Corp.* v. *NLRB*, 147 F.2d 69, 73 (5th Cir. 1945) (emphasis in original).

[43] As Member Jenkins noted in dissent, there is no reason "why a grievance may not pertain to a group rather than an individual complaint and accordingly be resolved on a group rather than an individual basis." 192 N.L.R.B. at 174.

class action since the 'evil sought to be ended is discrimination on the basis of a class characteristic.' Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968)." *Hecht* v. *Cooperative for American Relief,* 351 F. Supp. 305, 312-313 (S.D. N.Y. 1972).

Another court has noted:

> "While it is true that there are different factual questions with regards to different employees, it is also true that the 'Damoclian threat of a racially discriminatory policy hangs over the racial class." Hall v. Werthan Bag Corp., M.D. Tenn. 1966, 251 F. Supp. 184." *Johnson* v. *Georgia Highway Express, Inc.,* 417 F.2d 1122, 1124 (5th Cir. 1969).

Cf. Senate Comm. on Labor and Public Welfare, *Report No. 92-415,* 92d Cong., 1st Sess, 5 (1971). In short, many courts have agreed with Hollins and Hawkins that allegations of race discrimination must be treated as class allegations. While union and employer were not required to treat all race discrimination grievances as class grievances as a matter of law, it cannot be disputed that Hawkins and Hollins acted reasonably in believing that the union approach here would be inadequate.

Since their own approach to the Emporium to settle the grievances had been unfruitful, we contend that Hawkins and Hollins had a right to attempt to enlist consumer support to have the employer act on the grievance.[44] This

[44] This case meets the requirements imposed by the Court of Appeals in *NLRB* v. *Tanner Motor Livery, Ltd.,* 419 F.2d 216 (9th Cir.

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right to peaceful public protest in support of a grievance arises out of a paramount public interest in the subject matter of their grievance—race discrimination. It is not a general right, but one which may properly be limited to employment discrimination grievances which the unionized protesters have previously brought before the union and the employer without success, and which, as here, are founded on a reasonable and good faith belief in the legitimacy of the claim.[45] *Cf. National Labor Relations Board* v. *Fruit and Vegetable Packers,* 377 U.S. 58, 63 (because of the First Amendment, this Court does not ascribe to Congress a purpose to outlaw peaceful picketing unless there is the clearest indication in the legislative history).

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1969). In that case, the protesters lost the protection of §7 because the employees "had an obligation to go to the union with their desire for non-discriminatory hiring. The record does not demonstrate that they approached the union, nor does it indicate that the union gave its sanction to their actions." 419 F.2d at 221. Hollins and Hawkins, on the other hand, filed a grievance and worked with the union for more than half a year before they concluded that the union's approach would provide only token relief. Because Hawkins and Hollins met the *Tanner* requirements, the Court need not here determine whether these standards are correct.

Moore v. *Sunbeam Corp.,* 459 F.2d 811 (7th Cir. 1972) was decided erroneously. If a union's assertion that the employee's activities constituted violations of the no-strike clause is accepted, then it would be possible for unions to strip their members of their §§7 and 704 rights simply by asserting that such acts would be violative of the no-strike clause. But these rights cannot be waived. *Alexander* v. *Gardner-Denver Co., supra,* slip opinion at 14-15; see text at 21, *supra.*

[45] "The extent to which any individual employee's Section 7 rights will be limited by the needs of his collective bargaining unit has been the subject of case by case development." *NLRB* v. *Shop Rite Foods, Inc.,* 430 F.2d 786, 789 (5th Cir. 1970). The general rule is that picketing is lawful if it does not have an unlawful objective and is not conducted in an unlawful manner. *Hughes* v. *Superior Court of California,* 339 U.S. 460.

We have noted the statutory distinction between bargaining and the presentation of grievances in order to show that Congress recognized that there are legitimate exceptions to the need for exclusivity in labor relations. The proviso to §9 is one such exception, encompassing peaceful attempts by employees to resolve grievances against practices which violate significant statutory rights OR the collective bargaining agreement. This exception and its application to the facts of this case would not—contrary to the Board's fears—vitiate the underlying purpose of exclusivity. Nor does it place the employer in an intolerable dilemma. Under neither the NLRA nor Title VII was the Emporium required to deal with Hawkins and Hollins any more than it was required to deal with strangers, nonunionized employees, or supervisory personnel engaged in similar behavior. Neither statute places on the employer an affirmative burden. See *Broniman* v. *Great Atlantic & Pacific Tea Co.*, 353 F.2d 559, 562 (6th Cir. 1965), *cert. denied*, 384 U.S. 907; *Black-Clawson Co.* v. *International Association of Machinists*, 313 F.2d 179, 184-85 (2d Cir. 1962). Sections 7 and 704(a) merely prohibit an employer from disciplining any unionized employee for engaging in good faith and reasonable public protest in support of their grievance against race discrimination.

True, the Emporium was subject to economic pressures as a result of the handbilling. But it had several realistic options short of discharging Hollins and Hawkins for their peaceful public protest.[46] The employer could have ignored their activities, as it might have ignored identical behavior

[46] We recognize that the Court need not address itself to the issues raised by the following discussion. We present it merely to demonstrate that no serious harm will come to either the employer or the collective bargaining process if employers are prohibited from discharging unionized employees engaged in the peaceful type of protest involved here.

by strangers. It could have released information to the public, giving its side of the dispute, as it might have done if nonunionized employees had been involved. Or it might have held discussions with the protesters, in the union's presence, as specifically authorized by the second proviso to §9(a).[47]

Should the Emporium have chosen this third option, it would not be unreasonable to require Hawkins and Hollins to refrain from their public activities during the course of discussions, as evidence of their good faith interest in resolving the problem. Assuming a good faith effort by the employer to resolve the grievance in this manner, there are three potential outcomes which could present problems: (1) The Emporium could conclude that there was no basis for the grievance, and refuse to take any remedial measures; (2) it could accept the union's counter-proposals, assuming a difference between the union position and that of the protesters; or (3) it could accept the protesters' proposals, again assuming a difference between the union's and protesters' positions. However, there are means of resolving each of these potential problems without restricting §7 rights or forcing the Emporium into an impossible position.

1. Should the Emporium conclude in good faith that the grievance was unfounded, it could be required to enlist the aid of the EEOC. Title VII even establishes special machinery for such contingencies. Section 705(g), 42 U.S.C. §2000e 4(g), provides:

"The Commission shall have the power—

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[47] See note 32, *supra*.

"(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

"(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title . . . . "

Alternatively, the protesters' could be required to file a charge with the Board or the EEOC. The protesters should not, however, be required to refrain from resuming their public activities; such a requirement would not only allow the employer to determine by itself the scope of its employees' §7 rights, but would accord greater deference to the interests of the employer than to the public interest in hearing well-founded allegations of discrimination. A decision by the Board or the EEOC that the complaint was *without* foundation would assure that the allegations receive an impartial third party hearing and therefore would provide sufficient basis for requiring the employees to halt their public activities. Persistent picketing or leafletting after an adverse decision by the Board or the EEOC would be evidence of bad faith harassment and therefore would no longer be protected. The public has a vested interest in protecting the good faith efforts of employees to put pressure on their employer to end practices made unlawful by Title VII of the Civil Right Act, and this public interest outweighs the employer's economic interests. However, the public interest is represented if the complaint receives a hearing before an impartial public administrative

body. At that point, the individual protesters still retain their right to press their individual grievances through the courts, but the potentially disruptive effects of their activities are no longer outweighed by their public value. Persistent public accusations of discrimination after adverse administrative decision might well constitute disloyalty, so that the employees might be discharged for cause. *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9.

2. Because the considerations are the same, the same result should obtain if the employer rejects the protesters' proposals in favor of different proposals submitted by the union. The protesters should retain their §7 rights until an independent decision is rendered by the Board or the EEOC.

3. If the employer should determine that the protesters' proposals offer a better means of meeting his obligation not to discriminate than do the union's proposals, an arbitrable dispute may arise. The union then has the right to press its grievance through the contractually established procedure.

In short, the employer is not faced with an insoluble dilemma if peaceful public handbilling by unionized employees in support of grievances protesting racial discrimination in employment is held to be protected by §7. Yet such handbilling may well increase the incentive for both the employer and the union[48] to accelerate the elimination of discriminatory practices voluntarily.

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[48] "Economic pressure may be one of the few viable means by which the unions can be impelled to share elected leadership positions with Negro workers and to involve themselves in the problems of the newly hired 'disadvantaged' worker. [O]ne must recognize that if the walkout and pickets do not succeed in the legitimate objectives, black workers may well seek another representative not part of the traditional union structure . . . . " Gould, *Black Power in the Unions*, 79 YALE L. J. 46, 77 (1969).

In sum, the Board had the opportunity here to accommodate both the national labor policy of protecting concerted activity protesting discrimination *and* the policy of exclusive representation. In the past, the Board has taken care to put the highest priority on the elimination of discrimination in employment.[49] Its failure to do so here was an abdication of its responsibility to strike a proper balance among legitimate national labor interests. Worse, its decision needlessly narrows employee rights to oppose discrimination made unlawful by Congress.[50]

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[49] The Board refuses to extend the protection of the contract bar rule to a union guilty of racial discrimination, *Pioneer Bus Co.*, 140 N.L.R.B. 54 (1962), will rescind certification of a union guilty of negotiating a discriminatory bargaining agreement, *Local 1* v. *Independent Metal Workers Union* (*Hughes Tool Co.*), 147 N.L.R.B. 1573 (1964), and has agreed to investigate alleged union discriminatory practices before certifying that union as the exclusive representative, *Bekins Moving & Storage Co. of Florida, Inc.*, 211 N.L.R.B. No. 7 (1974). A bargaining order issued against an employer who has refused to bargain with a union guilty of race discrimination will not be enforced. *National Labor Relations Board* v. *Mansion House Center Management Co.*, 473 F.2d 471 (8th Cir. 1973).

[50] As an arm of the federal government, the NLRB is forbidden by the Fifth Amendment to contribute its services to the maintenance of race discrimination. *Bolling* v. *Sharpe*, 347 U.S. 497; *Shelley* v. *Kraemer*, 334 U.S. 1; *Bekins Moving & Storage Co. of Florida, Inc.*, 211 N.L.R.B. No. 7 (1974). As Member Jenkins has stated:

> "The Board as an organ of the Government, by withdrawing its protection from these employees who are protesting racial discrimination, is breaching its constitutional and statutory obligation not to aid or permit such discrimination." 192 N.L.R.B. at 176-177.

CONCLUSION

For the reasons stated, the Court of Appeals should be instructed to remand this case to the Board for entry of a finding that the Emporium's discharge of Hawkins and Hollins violated §8(a)(1) and for entry of an order requiring their reinstatement with back pay.

Respectfully submitted,

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